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IN THE

Supreme Court of the United States

No. [redacted] 119-

October Term, [redacted] 1969

GEORGE LARIS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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To The Honorable, The Chief Justice and The Justices of the Supreme Court of the United States:

This brief in opposition to the petition for writ of certiorari to the Supreme Court of Pennsylvania is being filed by the Office of the District Attorney of the County of Beaver, Commonwealth of Pennsylvania, for the reason that this case presents no issue of substance not previously decided by this Court.

History

(All record references are to the printed record of this case filed in the Superior Court of Pennsylvania.)

On July 10, 1963, an information was filed charging the petitioner in this case with three violations of the Criminal

Code of the Commonwealth of Pennsylvania. He was charged with establishing a gambling house, allowing persons to assemble for the purpose of gambling, and conspiracy to establish a gambling house. After four years of delay, the petitioner was tried before a jury, and on June 16, 1967, he was found guilty of all three offenses. After the verdict, motions for a new trial and in arrest of judgment were filed. On March 21, 1968, Judge James E. Rowley filed an opinion and order denying these motions. The opinion of the trial court is set forth at length beginning on page 93 of the petition for certiorari. The full opinion is also set forth in the record, beginning at page 242a. Following the sentence of the Court on April 3, 1968, the petitioner appealed to the Superior Court of Pennsylvania. The judgment of sentence was affirmed, *per curiam* on December 12, 1968. Subsequently, the Supreme Court of Pennsylvania, on February 12, 1969, denied a petition for the allowance of an appeal. On May 15, 1969, the petitioner, George Laris, filed a petition for a writ of certiorari, and the record was certified on that date.

During the month of June, 1963, the Pennsylvania State Police were informed that gambling activities were being carried on in a building located in Economy Borough, Beaver County (R-100a, 117a). The property in question was a 54 acre tract which had been leased by the petitioner, George Laris, from O. B. Weinman and his wife. This lease was to run for a period of two years from October 1, 1961 (R-70a). On this property was a residence and a cement block building. The residence was located in Allegheny County and the cement block building in Beaver County. The gambling game was being conducted in the cement block building which was a one-story building with five rooms in it. According to the petitioner, this building had been sublet to Jack Mazza in May, 1963. In the front

or entrance to this building there was a garage with a double door. In order to enter the rest of the building, it was necessary to pass through a series of two doors located at the back of the garage. This was the only entrance into the rest of the building. The first room inside the building was the largest and was the room where the dice table was located.

Following receipt of confidential information about gambling, a surveillance of this building was conducted on June 14, 1963, by Lt. Roy L. Titler and Trooper Joseph Valent (R-76a, 117a). On that occasion Trooper Valent and Lt. Titler observed the building and the activities around the building from a wooded area about 100 feet from the building. Both officers testified that they observed the petitioner, George Laris, and Jack Mazza on the premises and inside the concrete block building. They further testified that they went around the building and looked into the building and observed the dice table inside the large room in the building (R-76a, 118a). Both officers also testified to the fact that the table was standing on the legs in position for use as a crap table and that it was in the same position as on the night of the raid (R-78a, 118a). On June 22, 1963, Trooper Valent and another member of the State Police, Trooper McCloskey, returned to the area after receiving more information that gambling activities were being carried on (R-100a, 82a). They arrived at approximately 9:30 P. M. They observed the building from 100 feet away. From that point they observed several cars pulling up to the front of the door. They observed the occupants of the cars conversing with a man seated in a station wagon which was parked across the front of the garage. The cars were parked and the groups were escorted inside by the man in the station wagon (R-83a). The State Troopers proceeded to the back of the building

from where they could hear cards being shuffled and money being thrown on the table (R-85a). Following this, the Troopers reported to their superior officers and plans for the raid of this building were made. Warrants for the arrest of Jack Mazza and George Laris were obtained, as was a search warrant for the premises (R-86a). Thereafter, a raiding party of State Police proceeded to this building. In this party were Lt. Roy L. Titler, Lt. James D. Barger, Trooper Valent, Trooper McCloskey, Trooper Porter and Trooper Barr. When they arrived on the premises, they proceeded to a point on an embankment above the entrance to the building where they stayed for 15 or 20 minutes. This point was about 100 feet from the building (R-134a). At that time they observed a station wagon with a man sitting in it parked across the entrance to the garage. It was testified that when a car would drive up, this man would talk to the people in the car, after which the car would be parked. He would then lead them to the doorway inside the garage and admit them into the room where the dice game was being conducted. After he let them in, he would come back and sit in the station wagon. It was determined that this man was letting these persons in by means of a door knob which was found on the front seat of the station wagon in which he was sitting (R-135a). Following that, the raiding party proceeded to the back of the building where they could see into the building from windows which had been partially blacked out (R-136a). Each member of the raiding party testified that they had observed a dice game going on inside the room (R-136a). It was also testified that Mr. Laris was seen inside (R-121a, 136a). Following this observation, the party proceeded around to the front of the building where they observed more people entering (R-137a). At that time, Lt. Titler identified himself to the man who was sitting in the station

wagon and requested the key to the door leading into the building. Somebody inside looked out, at which time Lt. Titler shouted that it was the State Police and that they were conducting a raid. He thereupon ran into the room breaking through the first door and pushing the second open before it could be closed (R-138a). At that time, the arrest warrants for Mr. Laris and Mr. Mazza were read to them (R- 138a).

At the time of the raid, a number of items were seized which were used in evidence at the time of the trial. These items were the subject of a pre-trial suppression hearing and were objected to before the beginning of the trial. In addition to the dice table and legs, the following items were seized: Commonwealth's Exhibit No. 5, decks of playing cards; Commonwealth's Exhibit No. 6, a door knob with a shaft attached; Commonwealth's Exhibit No. 7, a door bell buzzer; Commonwealth's Exhibit No. 8, $34.35 in coin and currency; and Commonwealth's Exhibit No. 9, a poster entitled "Hard Ways". These items were all identified by Trooper Valent (R-92a, 93a, 95a, 96a). On December 10, 1963, a petition was filed to suppress the evidence which was seized on June 23, 1963, and in connection therewith the depositions of Trooper Joseph Valent and Lt. Roy L. Titler were taken. The petition to suppress was overruled and the case listed for trial. The petition to suppress appears on pages 12a, 13a, and 14a of the record. It is interesting to note that the petitioner did not raise the issue of an illegal trespass in that petition. In fact, he did not raise it at the pre-trial discussion in chambers before the start of the trial.

It was conceded by the Commonwealth that the search warrant which had been obtained by the Pennsylvania State Police in this case was invalid for the reason that it

did not sufficiently describe the location of the premises to be searched. There is, therefore, no issue to be considered in this respect. In addition, however, to the search warrant for the premises, the Pennsylvania State Police obtained body or arrest warrants for the petitioner, George Laris. At no time, either before the trial or during the post-trial motions and hearings, was the validity of this arrest warrant questioned. The trial Judge, in his opinion, says:

> "In the first place, it should be pointed out that the troopers obtained not only a search warrant but a body or arrest warrant for Mr. Mazza and the defendant Laris. This fact appears to have been overlooked by both the Commonwealth and the defendant's Counsel. At no time has defendant's counsel ever objected to or contended that the arrest warrant was void or invalid. Therefore, the officers, in executing a valid arrest warrant, were making a lawful arrest and the evidence seized incident thereto was properly admitted at trial" (R-255a).

In view of the fact that this question was not raised at any time in the trial Court, it is submitted that it is improper to do so now and for this reason alone the petition for certiorari should be denied.

Argument

The only issue presented in this case is whether or not the arrest of the petitioner was a lawful arrest. If the arrest was lawful, there is no question that the search and seizure that followed was incidental to the arrest and, therefore, valid. It is apparently the position of the petitioner that the trespass on the land in question by the State Police automatically makes the arrest unlawful and the subsequent search and seizure violative of the Fourth Amendment of the United States Constitution. It has been conceded by all parties concerned that the search warrant for

the premises did not sufficiently describe the property and was, therefore, invalid. It is the contention of the Commonwealth that the arrest of the petitioner was lawful on two grounds. The first is that there was issued, at the same time as the search warrant, a valid arrest warrant for George Laris. The second is that even without a warrant, the arrest was lawful since the State Police had probable cause to believe a misdemeanor was being committed in their presence.

At no time until the appeal did anybody suggest that the arrest warrant was not valid. No attempt was made by the petitioner's counsel at any time before or during trial to attack the validity of the arrest warrant. It must be assumed, therefore, that there was no basis for such an attack. The petitioner now argues that the arrest warrant, as well as the arrest on view, was not lawful by reason of the fact that the information which led to the obtaining of this warrant and to the arrest was acquired by a surveillance conducted on the premises in question and this surveillance constituted a trespass to land.

It is conceded by the Commonwealth that the surveillance made on June 14, 1963, from the nearby hillside and on June 23 from the same position constituted a trespass to land. This trespass, however, did not in anyway violate the constitutional rights of the petitioner, George Laris. Since the landmark case of *Hester v. United States*, 265 U. S. 57 (1924), it has been repeatedly held that open fields do not come within the purview of the Fourth Amendment provision which protects the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . ." This case has not been overruled and should apply in the present circumstances. A number of Circuit Court decisions have upheld the doctrine of the *Hester* case.

In the case of *United States v. Campbell,* 395 F. 2d 848 (4th Cir.), (1968), the Court of Appeals of the Fourth Circuit held that observation by Internal Revenue Agents of a transaction in illicit whiskey which took place in the back yard of defendant's home was not an unlawful search. The Agents viewed this transaction from an adjacent cornfield. The Court said that the "open field" doctrine applied to that observation. The Court further stated at page 849: "Nothing said in *Katz v. United States,* 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), requires a different result". Another similar case is that of *McDowell v. United States,* 383 F. 2d 599 (8th Cir.), (1967). In that case, Federal Agents undertook a surveillance of certain fields belonging to the defendant after having received complaints that the defendant was violating the Federal Game Laws. It was conceded that the Agents had no search warrant and no consent to be on the land of the defendant. During the course of the surveillance, the Agents observed evidence of the violations. There was an attempt to suppress the evidence and the testimony of the officers. At page 603, the Court held:

> "Under Federal Laws the search of open fields without a search warrant is not constitutionally unreasonable. *Hester v. United States,* 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1926). *This is true even though entrance to the area searched was gained by trespass. Hester v. United States, supra; Giacona v. United States,* 257 F. 2d 450 (5th Cir. 1958). Cert. denied, 358 U. S. 873, 79 S. Ct. 113, 3 L. Ed. 2d 104 (1958)." (Emphasis supplied.)

Contrary to the analysis of the opinion of the trial Court, there was no holding that the building was an open field or that it was not a constitutionally protected area. The Court did hold, however, that the police officers, in executing a valid arrest warrant, were making a lawful arrest and

that the evidence seized incident thereto was properly admitted at trial. Moreover, that the arrest was lawful since the State Troopers had probable cause to believe that a misdemeanor was being committed in their presence. Judge Rowley pointed out that a trespass to land without more does not invalidate a subsequent seizure (R-257a). It should also be noted that there was, in fact, no trespass as to the petitioner, Laris, for the reason that the building in question had been leased by him to Jack Mazza.

The petitioner has questioned for the first time, the existence of probable cause for the issuance of a warrant or for the arrest.

This position is based on the theory that police acquired the information necessary to establish probable cause by trespassing on the petitioner's property. This theory was not advanced during any of the proceedings in the trial Court; and for this reason, it is submitted cannot be raised now.

Moreover, to hold that a trespass to land would taint any information acquired thereby so that it could not be used to establish probable cause would go far beyond any case now in existence. Furthermore, to so hold would require an overruling of *Hester v. United States, supra,* pg. 7.

It is submitted that it is clear that probable cause existed for the issuance of the warrant.

Since probable cause existed for the issuance and there was nothing improper in the manner of execution of the warrant, it is submitted that any evidence seized in connection with the arrest would be lawfully seized and therefore admissible at the trial. Therefore, the trespass committed by the State Police would not taint the procuring of the arrest warrant or the execution of the same by the officers.

It is also contended by the Commonwealth, that in addition to the fact that they had in their possession a valid arrest warrant, the arrest was lawful since the police had probable cause to believe that a misdemeanor was being committed in their presence.

In *Commonwealth v. Garrick,* 210 Pa. Super. 124, at p. 126 the Court said:

> ". . . The rule in this state is that an officer may make an arrest without a warrant where he has probable cause to believe that a misdemeanor is being committed in his presence. *Commonwealth v. Calvarese,* 199 Pa. Superior Ct. 319, 185 A. 2d 657 (1962); *Commonwealth v. Rubin,* 82 Pa. Superior Ct. 315 (1923); *Rarick v. McManomon,* 17 Pa. Superior Ct. 154 (1901); . . ."

There are numerous items which would justify the State Police as prudent men in believing that a misdemeanor was being committed on the premises. To begin with, the State Police had information from an informant that gambling was being carried on in this building. On June 14, two State Troopers observed Mr. Mazza and Mr. Laris on the premises and also observed a dice table inside the building. On June 22 and June 23, they observed numerous automobiles parked and pulling up and the numerous persons going into the building. The manner in which the car was parked across the entrance to the garage making it impossible for anyone to drive into the garage was an unusual circumstance. The attendant ushering groups of people through the garage and through two doors into the area where the gambling table was located was also a highly suspicious circumstance. Furthermore, the police could observe that the windows in the concrete building were blacked out. It should also be remembered that these activities were being conducted very late at night. Almost

all of these facts and circumstances became known to the police from the hillside 100 feet from the building. In addition, the officers heard the shuffling of cards and the sound of money. The sum total of these facts certainly would be sufficient to justify a prudent man in believing that a misdemeanor was being committed.

When the raiding party arrived at the concrete building and looked through the window at the dice game which was in progress, obviously they knew a misdemeanor was being committed. There is no question about the fact that they had probable cause at that time to make an arrest. The only question to be determined would be at what point, if at all, the officers violated the Fourth Amendment.

In asserting that the search and seizure and the arrest was in violation of the Fourth Amendment, the petitioner relies primarily on the recent case of *Katz v. United States*, 389 U. S. 347, 88 S. Ct. 507 (1967).

The *Katz* case is, of course, distinguishable from our case, and the most important distinguishing feature is the fact that the surveillance was conducted by means of electronic equipment. This, it is submitted, is the crux of the case in question.

The Court, in the majority opinion in *Katz* does not, address itself to the problem which exists in the case at bar. There is obviously a distinction between evidence acquired by the use of electronic equipment and evidence acquired solely by viewing the commission of a crime.

The petitioner's counsel has attempted to equate our case with those cases involving the use of electronic equipment. The comparison is not appropriate. It is submitted that our case should be compared first to the cases involving the "open field" rule of the *Hester* case and secondly to the

cases involving the search of automobiles. The *Hester* rule would apply to the surveillances made by the State Police from the nearby hillside. The actions of the State Police in looking through the window would be very similar to a situation where the police officer seizes evidence which he sees inside an automobile. In the *Katz* case, *supra*, at p. 511, the Court says:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

This dice game operated by George Laris was not only exposed to the public, the public was invited. There is obviously a very great distinction between invading the privacy of a phone booth and viewing, through a window, a crowd of thirty people around a dice table shooting dice.

By virtue of the fact that the police officers had probable cause to believe that a misdemeanor was being committed in their presence, the petitioner's arrest was lawful. Since the evidence in question was seized after a search incident to that arrest, it was admissible at the trial. The law is well settled that a search and seizure incident to a lawful arrest does not violate the Fourth Amendment.

The position of the petitioner, as set forth in the petition for writ of certiorari, is based on a number of unwarranted assertions about the affirmance of the Court of Quarter Sessions of Beaver County. The actions of the Supreme and Superior Courts of Pennsylvania are, in fact, only an affirmance of the conviction and, in fact, do not indicate any position whatsoever by the Appellate Courts of Pennsylvania. An effort has been made throughout the petition for certiorari to suggest that the Appellate Courts of the Commonwealth of Pennsylvania and the decision of the Court of Quarter Sessions of Beaver County, Pennsyl-

vania, is in conflict with the decisions of the Supreme Court of the United States, specifically, *Katz v. United States, supra,* p. 11; *Recznik v. City of Lorain,* 21 L. Ed. 2d 317 (1968) and *Alderman v. United States,* 22 L. Ed. 2d 176. In view of the decisions of the Superior Court and Supreme Courts of Pennsylvania, it is respectfully suggested that those Courts did not find these decisions applicable to this case and for that reason did not feel that there was any necessity for writing an opinion. This certainly would not suggest that the Appellate Courts of Pennsylvania have taken the positions which have been set forth in the petition for certiorari. In fact, the only conclusion which can be drawn is that the Appellate Courts of Pennsylvania found in the record no basis for a reversal of the conviction. Perhaps the most that can be said is that the Supreme and Superior Courts of Pennsylvania agreed with Judge Rowley that the petitioner had a fair trial, that the evidence supported the verdict of the jury, and that none of the reasons advanced by the petitioner in support of his motions in arrest of judgment and for a new trial had any merit. It is obvious that the Superior Court could have reached the same conclusion as did the trial Judge; that the evidence was seized incidental to a lawful arrest and was, therefore, properly admitted at trial, and that since there had been no objection to the validity of the arrest warrant, it was not a question which could be raised on appeal.

In addition to the *Katz* case, the petitioner relies on two other recent cases: *Recznik v. City of Lorain,* 21 L. Ed. 2d 317 (1968) and *Alderman v. United States,* 22 L. Ed. 2d 176. The *Alderman* case differs factually from our case, in that it involves electronic surveillance. The *Recznik* case is, in some respects, factually similar to our case.

However, there was no arrest warrant involved, and the decision turned on the question of whether or not probable cause existed for the making of an arrest. The Court held that the respondent did not meet that burden of proving probable cause. This conclusion was based on the testimony of the senior arresting officer who testified that when he entered the apartment, he had no evidence to make an arrest. The facts as stated in the opinion, indicate that the police officers did not observe the gambling game being conducted until after they were inside the premises. In our case, of course, the game was observed by the officers while they were outside the building. It is urged that on the basis of the entire record in our case, the facts and circumstances clearly warrant the conclusion that the police did, in fact, have probable cause not only for the acquiring of the arrest warrant, but for the making of an arrest by virtue of the fact that a misdemeanor was being committed in their presence.

Conclusion

Although the State Police committed a trespass to land, it is submitted that the constitutional rights of the petitioner were not thereby violated. *Hester v. United States,* 265 U. S. 57 (1924). Watching a dice game through the window of an isolated building does not constitute an unreasonable search and seizure. It would, however, be a valid basis for a lawful arrest and would justify a search and seizure as an incident of the arrest. It would follow that such evidence would be admissible at any subsequent trial.

It is respectfully suggested that the petitioner received a fair trial and that his conviction was proper. Moreover, it is submitted that the petitioner has improperly

raised additional questions not raised in the trial Court. For these reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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